

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PENSKE BUSINESS MEDIA, LLC,

Plaintiff,

-against-

T-C 475 FIFTH AVENUE, LLC,

Defendant.

Date Filed: _____

Index No.: _____/2018

(NYSCEF Case)

SUMMONS

Plaintiff designates New York
County as the place for trial.

The basis of venue is the location of
the subject property.

TO THE ABOVE NAMED DEFENDANT(S):

YOU ARE HEREBY SUMMONED to answer the complaint in this action and to serve a copy of your answer, or, if the complaint is not served with this summons, to serve a notice of appearance on the Plaintiff's attorneys within twenty (20) days after the service of this summons, exclusive of the day of service (or within thirty (30) days after the service is complete if this summons is not personally delivered to you within the State of New York); and in case of your failure to appear and answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated: New York, New York
November 29, 2018

Yours, etc.,

NEWMAN FERRARA LLP
Attorneys for Plaintiff

By: _____

Lucas A. Ferrara
Jarred I. Kassenoff
1250 Broadway, 27th Floor
New York, New York 10001
(212) 619-5400

Defendant(s) Address(es):

T-C 475 FIFTH AVENUE, LLC
475 Fifth Avenue
New York, New York 10017
Attn: Project Management Office

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

PENSKE BUSINESS MEDIA, LLC,

Plaintiff,

-against-

T-C 475 FIFTH AVENUE, LLC,

Defendant.

Index No. _____
(NYSCEF Case)**VERIFIED COMPLAINT**

Plaintiff, PENSKE BUSINESS MEDIA, LLC (“Plaintiff” or “Penske”), by its attorneys, NEWMAN FERRARA LLP, as and for its complaint against Defendant, T-C 475 FIFTH AVENUE, LLC (“Defendant” or “Landlord”), respectfully alleges as follows:

PARTIES

1. Plaintiff is a Delaware limited liability company authorized to conduct and transact business in the State of New York.
2. Upon information and belief, Defendant is a Delaware limited liability company.
3. Upon information and belief, Defendant is authorized to conduct and transact business in the State of New York.
4. Upon information and belief, Defendant is the fee owner of the Building known as, and located at, 475 Fifth Avenue, New York, New York (the “Building”).

NATURE OF THE CASE

5. Penske is an American digital media, publishing, and information services company based in Los Angeles and New York City.
6. Penske publishes more than 20 digital and print brands.

7. As part of its operations, Penske maintains office space located on several floors (the “Leased Premises”) of the Building.

8. Penske is currently in the process of building out (the “Project”), a portion of the Leased Premises located on the tenth floor of the Building (the “Subject Premises”), for use by employees of *Rolling Stone Magazine* (“Rolling Stone”),¹ who are awaiting a relocation from another space.

9. However, Penske’s work has been wrongfully and unreasonably interrupted by Landlord.

10. In response to the engagement of one of the subcontractors retained by the Project’s general contractor, Landlord has cited purported “labor harmony” concerns.

11. Specifically, at the eleventh-hour, Landlord has demanded that all electrical work in the Building be performed by members of the Local 3 Chapter (“Local 3”) of the International Brotherhood of Electrical Workers (“IBEW”), while Penske’s preferred electrical subcontractor for the Project is associated with Local 363 of the United Service Workers of America (“Local 363”).

12. Landlord’s purported “labor harmony” rationale is belied by the fact that prior projects in the Building have used Local 363 members.

13. Indeed, the Project’s general contractor has previously used Local 363 labor in the Building.

14. Further, it is not uncommon in New York City that both Local 363 and Local 3 are on site at the same building simultaneously providing services, including at buildings operated by some of the largest real estate owners in the city.

¹ Rolling Stone is one of Plaintiff’s publications.

15. On information and belief, there was at least one instance in 2015 where both Local 3 and Local 363 have worked in the Building at the same time without disharmony.

16. Further, there is a decision of the United States Court of Appeals for the Second Circuit (enforcing a National Labor Review Board decision) expressly barring Local 3 from taking any steps to cause labor disruptions in the event another union is hired to perform work in a building wherein Local 3 laborers are engaged.

17. Thus, there can be no “disharmony” between the unions, as a matter of law.

18. Accordingly, it is clear that Landlord’s purported reasoning for refusing to approve, and denying access to, the Project’s electrical subcontractor is nothing more than a pretext.

19. As a result of Landlord’s unreasonable interference with Penske’s work, Penske is unable to complete the Project using its preferred labor.

20. Such unreasonable refusal threatens the Project’s timely completion, the quality of the work, as well as the Project’s cost – which monies may not be compensable or recoupable from the Landlord.

BACKGROUND

Governing Lease

21. Penske and Landlord entered into an Office Lease, dated December 19, 2014 (the “Initial Lease”) for premises consisting of the entire 2nd, 3rd, 14th and 16th floors of the Building (the “Initial Premises”).

22. The parties subsequently entered into a First Amendment to Lease, dated August 12, 2016 (the “First Amendment”), and a Second Amendment to Lease, dated June 7, 2018 (the “Second Amendment”) (the Initial Lease, First Amendment and Second Amendment, collectively, the “Lease”) which, *inter alia*, expanded the Initial Premises to include the Subject Premises.

The Project

23. After entering into the Second Amendment, Penske began the process of planning a build out the Subject Premises for use as office space.

24. Penske received three separate bids for the Project from general contractors.

25. Penske ultimately accepted the bid, dated October 9, 2018 (the “Apogee Bid”), from Apogee Design & Construction, Inc. (“Apogee”).

26. When soliciting bids, Penske made it clear that union labor would be required for the Project.

27. Penske’s ultimate acceptance of Apogee’s bid was partially motivated by the knowledge that Apogee had previously performed work in the Building and was thus fully familiar with the Building’s labor requirements.

28. Apogee retained Patriot Electric Corp. (“Patriot”) to perform certain electrical work in connection with the Project.

29. Upon information and belief, Patriot uses labor from Local 363.

30. Landlord, through its managing agent, Jones Lang Lasalle (“JLL”) has been involved with the Project’s planning.

31. JLL was advised on or about June 1, 2018, that Penske had retained Apogee to perform the Project.

32. JLL was further advised on or about November 2, 2018, that Apogee had retained Patriot in connection with the Project.

33. Neither Landlord, nor JLL, ever advised Penske that the Project’s labor would have to be performed by a specific union.

34. Indeed, Penske has worked with Landlord for many years, including when building-out the other portions of the Leased Premises.

35. At no point, was Penske ever advised that a specific union had to be utilized.

36. Notably, neither the Lease nor the “Building Rules and Regulations” and “475 Fifth Avenue Contractor’s Rules and Regulations,” both provided to Penske by Landlord are silent on that issue.

Landlord’s Refusal to Approve Patriot

37. On or about November 5, 2018, during a routine meeting between representatives of Penske, Apogee and JLL (the “11/5/18 Meeting”), JLL advised that, as Patriot was not part of Local 3, it would not be approved to perform work in the Building due to the need to preserve “union harmony.”

38. An email from Michelle Sampson, a General Manager at JLL, dated November 5, 2018 (the “11/5/18 Email”), noted the following:

Regarding the request on local 363 performing work on the project. The 2 unions have a territorial agreement within the IBEW. As such, NYC belongs to local 3. We wish to be respectful of that and not violate any agreements within their territories.

39. After receipt of the 11/5/18 Email, Penske consulted with Alan Kenny, a principal of Apogee, to inquire whether electrical work had to be performed by any specific union, based on his prior experience performing work in the Building.

40. Mr. Kenny advised that he was not aware of any such requirement.

41. Indeed, Mr. Kenny advised that Apogee had performed certain work in the Building’s twelfth floor in or about 2015 (the “12th Floor Project”).

42. Upon information and belief, Apogee retained Millennium Maintenance & Electrical Contractors Inc. (“Millennium”) in connection with the 12th Floor Project.

43. Upon information and belief, Millennium used Local 363 labor.

44. Further, a review of public records indicates that another electrical contractor which, upon information and belief, uses Local 363 labor had also been approved to perform work in the Building.

45. By way of example, a review of New York City Department of Building (“DOB”) records indicate that, on or about October 18, 2017, a firm named Control Electrical Contracting Corp. (“Control Electrical”) received approval to perform work in the Building.

46. Upon information and belief, Control Electrical uses Local 363 labor.

47. Based on this information, Penske, by letter dated November 20, 2018 (the “11/20/18 Letter”) from its Deputy General Counsel, to Landlord, highlighted Landlord’s inconsistency and requested that Landlord reconsider its position that only Local 3 labor would be approved for the project.

48. Penske noted that, given Landlord’s prior approval of Local 363 labor, its refusal to approve Patriot violated the Lease (which required that any work-related refusals be “reasonable”).

49. At approximately 4:30 pm on November 20, 2018 (after the 11/20/18 Letter was hand-delivered to Landlord), Penske became aware that Landlord was barring Apogee’s workers from the Building.

50. Apogee was ultimately granted access to the Premises on condition that any electrical work be performed by Local 3 electrical workers.

51. By letter from Landlord's counsel, dated November 21, 2018 (the "11/21/18 Letter"), Landlord denied Penske's request for Patriot's approval and reiterated its position that only Local 3 labor could be used in connection with the Project.

52. Landlord further advised that only approved subcontractors, with proper identification, would be permitted access.

53. Finally, Landlord advised that it had previously approved JRD Electric Corp. ("JRD") to perform certain preliminary electrical work in the Subject Premises overseeing demolition disconnects and JRD could continue to do so.

54. Notably, the reasoning for Landlord's insistence on Local 3 labor provided in the 11/21/18 Letter differs from the reasoning initially provided by JLL.

55. Specifically, as detailed above, JLL advised that Local 363 labor could not be used because of a purported "territory agreement" between Local 3 and Local 363.

56. However, the 11/21/18 Letter provides, in relevant part:

Given the ongoing work in the Building by Local 3 subcontractors, we reasonably believe that allowing a non-Local 3 subcontractor in the Building will cause labor disharmony in the Building and could have other adverse consequences.

57. This change in justification may be due to the fact that the 11/5/18 Email was based on an incorrect assumption that Local 363 was a member of IBEW, and therefore subject to a so-called "territorial agreement within the IBEW," as cited in the 11/5/18 Email.

58. As noted, Local 363 is not a member of the IBEW.

59. It is significantly more expensive to use JRD instead of Penske's preferred subcontractor, Patriot.

60. Since the Subject Premises are earmarked to be used for certain business operations, including those of *Rolling Stone Magazine*, whose offices are currently housed at 1290 Sixth Avenue (the “Current Premises”), any delay could impact Penske’s business operations.

61. Additionally, Penske is currently in the process of negotiating a subtenancy for the Current Premises.

62. In the event the proposed subtenancy commences at the Current Premises before the Subject Premises are built-out, Rolling Stone’s operations would be needlessly disrupted and/or Penske would be compelled to find interim premises for its displaced employees.

AS AND FOR A FIRST CAUSE OF ACTION
(Declaratory Relief)

63. Plaintiff respectfully repeats and realleges each and every allegation contained in paragraphs “1” through and including “62” above, with the same force and effect as if fully set forth herein.

64. An actual dispute and controversy exists in that Defendant is refusing to allow or approve Patriot to work on the Subject Premises.

65. The Lease provides that any refusal to approve a contractor based on “labor harmony” concerns must be reasonable.

66. Section 4(b) of the Lease provides, in relevant part, as follows:

All Alterations shall be constructed at Tenant’s sole cost and expense, in a first class and good and workmanlike manner by contractors, subcontractors, engineers and architects **reasonably acceptable** to Landlord and only good grades of materials shall be used. With respect to contractors and subcontractors performing work on the Building’s structural elements or Building systems Tenant shall use contractors from Landlord’s designated list.

...

Without limiting the other grounds upon which Landlord may refuse to approve any contractor or subcontractor, **Landlord may reasonably take into account the desirability of maintaining harmonious labor relations at the Project.** (Emphasis added.)

67. Here, Landlord's insistence on Local 3 labor is unequivocally unreasonable.

68. Local 3 is barred by a judgment of the United States Court of Appeal for the Second Circuit, dated June 17, 1983 (the "1983 Judgment") (enforcing a September 30, 1982 Order of the National Labor Relations Board (the "9/30/82 Order")), and a Consent Order entered by the Second Circuit on July 17, 1996 (the "Consent Decree"), from taking any action in retaliation for an employer's hiring of non-Local 3 labor.

69. Further, upon information and belief, Landlord has approved Local 363 labor in the Building multiple times in the past, including on at least one instance when Local 3 was also providing services in the Building.

70. Upon information and belief, such approvals have not led to any "labor disharmony."

71. Accordingly, any "labor harmony" concerns are unreasonable, as a matter of law.

72. Nevertheless, as evidenced by the 11/21/18 Letter, Landlord has refused to approve Patriot to work in the Building and is insisting on the use of Local 3 labor.

73. Accordingly, a justiciable controversy exists.

74. Plaintiff lacks an adequate remedy at law.

75. By reason of the foregoing, among other things, Plaintiff is entitled to judgment declaring that: (a) Landlord's refusal to approve Patriot to work in the Building is unreasonable and in violation of the Lease, and (b) Plaintiff is entitled to use Patriot in connection with the Project.

AS AND FOR A SECOND CAUSE OF ACTION
(Injunctive Relief)

76. Plaintiff repeats and realleges each and every allegation set forth in paragraphs “1” through and including “75” above, with the same force and effect as if fully set forth herein at length.

77. As set forth above, Landlord has unreasonably, and in bad faith, refused to approve Patriot and has barred the latter from accessing the Premises to do its work.

78. Further, Plaintiff may arguably be barred from recovering its monetary damages in the event it is forced to complete the Project with costlier Local 3 Labor.

79. Paragraph 19(gg) of the Lease provides, in relevant part, as follows:

Consent. With respect to any provision of this Lease which provides, in effect, that Landlord shall not unreasonably withhold or unreasonably, delay or condition any consent or any approval, Tenant in no event shall be entitled to make, nor shall Tenant make, any claim, and **Tenant hereby waives any claim, for money damages;** nor shall Tenant claim any money damages by way of setoff, counterclaim or defense, based upon any claim or assertion by Tenant that Landlord has unreasonably withheld, unreasonably conditioned or unreasonably delayed any consent or approval; but **Tenant’s sole remedy shall be an action or proceeding to enforce any such provision, or for specific performance, injunction or declaratory judgment,** any of which may be sought through the dispute procedure outlined in subparagraph 19 (ff) above. (Emphasis added.)

80. Accordingly, there is a very real risk that, even if this Court were to find that Defendant’s refusal to approve Patriot was unreasonable, it could also find that Plaintiff is not entitled to any monetary damages in connection therewith.

81. Further, any delay in completing the Project could result in the interruption of Rolling Stone’s operations.

82. Accordingly, Plaintiff will suffer irreparable harm if injunctive relief is not granted.

83. By reason of the foregoing, it is respectfully submitted that Plaintiff is entitled to an injunction temporarily, preliminarily and permanently (a) directing Defendant to approve Plaintiff's proposed subcontractor, Patriot, in connection with Plaintiff's build-out of the Subject Premises, and (b) enjoining Defendant from restricting Plaintiff's contractors' access to the Subject Premises or otherwise interfering with the Project.

AS AND FOR A THIRD CAUSE OF ACTION
(Specific Performance)

84. Plaintiff repeats and realleges each and every allegation set forth in paragraphs "1" through and including "83" above, with the same force and effect as if fully set forth herein at length.

85. As set forth above, the Lease is an enforceable contract.

86. As further set forth above, Plaintiff has complied with all of its obligations concerning construction in, or alteration to, the Subject Premises.

87. Plaintiff stands ready, willing and able to satisfy any other obligations pursuant to the Lease.

88. Defendant has refused to approve Patriot in violation of its duties under the Lease.

89. As set forth above, Plaintiff lacks an adequate remedy at law.

90. Accordingly, it is respectfully submitted that Plaintiff is entitled to a judgment directing Defendant to comply with its obligations under the Lease by, *inter alia*, approving Patriot to work in the Subject Premises and not take any steps to block Patriot's access to the Subject Premises or otherwise unreasonably interfere with the Project.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully demands entry of judgment, as against Defendant,
as follows:

- (a) On the First Cause of Action, declaring that: (a) Landlord's refusal to approve Patriot to work in the Building is unreasonable and in violation of the Lease, and (b) Plaintiff is entitled to use Patriot in connection with the Project;
- (b) On the Second Cause of Action, temporarily, preliminarily and permanently (a) directing Defendant to approve Plaintiff's proposed subcontractor, Patriot, in connection with Plaintiff's build-out of the Subject Premises, and (b) enjoining Defendant from restricting Plaintiff's contractors' access to the Subject Premises or otherwise interfere with the Project;
- (c) On the Third Cause of Action, directing Defendant to comply with its obligations under the Lease by, *inter alia*, approving Patriot to work in the Subject Premises and not take any steps to block Patriot's access to the Subject Premises or otherwise unreasonably interfere with the Project; and
- (d) Granting Plaintiff any further relief that the Court deems just, equitable and/or proper, including, without limitation, Plaintiff's attorneys' fees, costs and disbursements.

Dated: New York, New York
November 29, 2018

NEWMAN FERRARA LLP
Attorneys for Plaintiff
1250 Broadway, 27th Floor
New York, New York 10001
(212) 619-5400

By: 

Lucas A. Ferrara, Esq.
Jarred I. Kassenoff, Esq.

VERIFICATION

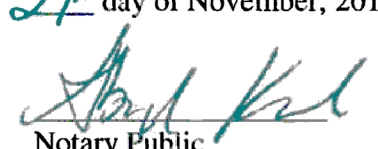
STATE OF NEW YORK)
) ss.:
 COUNTY OF NEW YORK)

TARIK WEST, being duly sworn, deposes and says:

I am Vice President of Human Resources of Penske Business Media, LLC, the plaintiff in this action. I have read the foregoing complaint in this action, and I know the contents thereof to be true based upon my own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true. The grounds of my belief as to all matters not stated upon my personal knowledge are the documents and records maintained in the plaintiff's files, and my personal involvement in the dispute giving rise to this action. This verification is made by me because plaintiff is a limited liability company and I am an officer thereof.


 TARIK WEST

Sworn to before me this
27th day of November, 2018


 Notary Public

Abigail M Kagle
 Notary Public State of New York
 New York County
 Lic. #02KA6256941
 Comm. Exp. 8/14/2021